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## Deception, Professional Speech, and CPCs: On *Becerra*, Abortion, and the First Amendment

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## Deception, Professional Speech, and CPCs: On *Becerra*, Abortion, and the First Amendment

MARK STRASSER†

### I. INTRODUCTION

In *National Institute of Family & Life Advocates v. Becerra*, the United States Supreme Court struck down a California law requiring crisis pregnancy centers to post certain signs.<sup>1</sup> The Court implied that the case involved a relatively straightforward example of governmental overreaching, with the government allegedly attempting to commandeer private entities and force them to convey the government's message.<sup>2</sup> Yet, the Court omitted important background information when discussing the state's implicated interests,<sup>3</sup> and the Court's analyses and rationales may have important First Amendment implications. While the Court may have reached the right result, its analyses bode poorly for a reasoned and consistent approach with respect to abortion regulations on

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1. 138 S. Ct. 2361, 2378 (2018).

2. *See id.* at 2371 (“[L]icensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them.”).

3. *See infra* notes 4–25 and accompanying text.

the one hand or a variety of First Amendment issues on the other.

Part II of this Article offers background information about crisis pregnancy centers as well as some discussion of the existing jurisprudence regarding the constitutionality of limitations on commercial and professional speech. Part III discusses *Becerra*, noting how the decision omitted important information that should have been part of the analysis—while the result would have been the same, the Court would not have been implying that it was making important changes in First Amendment jurisprudence. Part IV discusses some of the possible implications of *Becerra*, including some of the suits that likely will be filed in light of the opinion. The Article concludes that the opinion has a number of surprising implications and time will tell whether these reflect poor craftsmanship or instead a shift in a few different areas of constitutional law.

## II. CRISIS PREGNANCY CENTER REGULATION

Crisis pregnancy centers (CPCs) provide a variety of free services to pregnant women, although critics charge that many of the centers use misleading advertisements to induce women to come to the centers and that many of the centers provide misinformation about abortion to some of their clients. States attempting to regulate what is said in these ads or centers have faced a variety of challenges focusing on whether the states are thereby violating First Amendment speech guarantees. Any analysis of those guarantees must include an analysis of the kind of speech being regulated and the kind of tests that are thereby triggered, which themselves have been quite controversial. This Section offers some background information about CPCs and about the constitutional limitations on regulations of commercial and professional speech.

### A. Background on Crisis Pregnancy Centers

CPCs have a nationwide presence.<sup>4</sup> They provide a variety of services to pregnant women,<sup>5</sup> often free of charge.<sup>6</sup> These centers do not provide abortions,<sup>7</sup> and may seek to dissuade women from aborting their pregnancies.<sup>8</sup>

Critics charge that *some*<sup>9</sup> of the centers use deceptive means to reduce the number of abortions performed,<sup>10</sup> for example, by misrepresenting in advertisements what the

4. Brittany A. Campbell, *The Crisis Inside Crisis Pregnancy Centers: How to Stop These Facilities from Depriving Women of Their Reproductive Freedom*, 37 B.C. J.L. & SOC. JUST. 73, 77 (2017) (“Since their inception in the 1960s, crisis pregnancy centers (CPCs) have proliferated throughout the United States and now exist in every state.”).

5. Victoria Fuller, *When Care and Conscience Conflict: Compelled Speech in the Amendment to the Illinois Health Care Right of Conscience Act*, 42 S. ILL. U. L.J. 297, 300 (2018) (“Crisis pregnancy centers provide numerous social services, such as parenting classes, options counseling, baby supplies, and other financial aid.”); Kirsten Gallacher, *Protecting Women from Deception: The Constitutionality of Disclosure Requirements in Pregnancy Centers*, 33 WOMEN’S RTS. L. REP. 113, 114–15 (2011) (“[P]regnancy centers often provide valuable services like practical assistance and emotional support.”).

6. Beth Holtzman, *Have Crisis Pregnancy Centers Finally Met Their Match: California’s Reproductive FACT Act*, 12 NW. J.L. & SOC. POL’Y 78, 79–80 (2017) (“Crisis Pregnancy Centers (CPCs), also known as Limited Service Pregnancy Centers or Pregnancy Resource Centers, are pro-life, non-profit organizations that provide counseling and limited pregnancy services to women, usually free of charge.”).

7. Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 AM. J.L. & MED. 85, 116 (2015) (“CPCs are pregnancy service providers that do not provide abortion despite the misleading nomenclature of ‘crisis pregnancy center.’”).

8. *Id.* at 115 (“Crisis Pregnancy Centers (CPCs) . . . misleadingly suggest that abortions are provided in order to draw women in and then dissuade them from getting an abortion.”).

9. *Cf.* First Resort, Inc. v. Herrera, 860 F.3d 1263, 1269 (9th Cir. 2017) (“[S]ome CPCs ‘openly acknowledge, in their advertising and their facilities, that they do not provide abortions or emergency contraception.’” (citation omitted)), *cert. denied*, 138 S. Ct. 2709 (2018).

10. See Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 597 (2012) (“A host of . . . reports have provided further documentation of continued deception by crisis pregnancy centers.”).

centers do so that women seeking abortions will nonetheless come to the clinics.<sup>11</sup> Once there, the women may be provided with false or misleading information,<sup>12</sup> including misinformation about the alleged detrimental effects of abortion.<sup>13</sup>

Other methods to deter abortion include misrepresenting how far along a pregnancy is, which might result in a pregnant woman's missing the deadline for obtaining an abortion.<sup>14</sup> In addition, a woman might be advised to wait to obtain an abortion until after the fetus is viable,<sup>15</sup> justified perhaps by claiming that there is a significant probability that the woman will have a miscarriage and so will not have to undergo any procedure.<sup>16</sup> But putting off an abortion can have adverse

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11. *Id.* at 597–98 (“[T]he centers disguise the true nature of the services they will provide in order to lure women to the clinic.”).

12. *Id.* at 598 (“[O]nce women are at the clinic, the centers provide them with false and misleading information.”).

13. *Id.* at 597 (discussing a report finding that “87% of the centers investigated ‘provided false or misleading information about the health effects of abortion,’ and that the centers often ‘grossly misrepresented the medical risks of abortion.’”(citation omitted)). *See also* Holtzman, *supra* note 6, at 80 (“If CPCs do discuss abortion as an option with their clients, those women are inundated with unreliable and egregiously misleading information about abortion procedures and the risks involved.”).

14. Holtzman, *supra* note 6, at 85 (“CPCs also attempt to delay a woman’s ability to obtain a safe legal abortion . . . by lying about gestational age. . . . Other CPCs simply deceive women by telling them they are not far along in their pregnancy, hoping that the women will miss the window of opportunity for obtaining an abortion.”). *See also* *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 239–41 (2d Cir. 2014) (discussing a case in which a woman was inaccurately told that she needed multiple ultrasounds before she could obtain an abortion, eventually resulting in her missing the deadline to obtain an abortion).

15. Holtzman, *supra* note 6, at 85 (“[T]he website for Los Angeles Pregnancy Services, a CPC, instructs women not to seek an abortion until they have ‘confirmed from an ultrasound that the pregnancy is viable.’”(citation omitted)).

16. *Id.* (“CPCs also attempt to delay a woman’s ability to obtain a safe legal abortion by . . . exaggerating the number of pregnancies that end in natural miscarriages . . . . For instance, during the NARAL investigations, one CPC told women that induced abortion was not necessary because 30% to 50% of all pregnancies end in a miscarriage or a ‘spontaneous abortion.’”).

health effects,<sup>17</sup> even assuming that such an option is still available when the procedure is sought.

Women who mistakenly go to a CPC may believe that they are in a medical clinic where various medical services can be obtained.<sup>18</sup> The impression that the center is a full-service clinic is bolstered when people working there wear white lab coats or medical scrubs, thereby creating an impression that those individuals perform certain services, even if those individuals are not licensed to provide those services.<sup>19</sup> If women seeking an abortion who went into the CPCs learned right away that such services could not be provided, they at least would not waste valuable time waiting for something that could not be provided, although a separate question would involve how soon thereafter an appointment to obtain an abortion could be made and whether, in addition, a mandated waiting period would further delay when such a procedure could take place.<sup>20</sup>

Women who mistakenly go to the CPCs may not have

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17. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2390 (2018) (Breyer, J., dissenting) ("The legislature heard that information-related delays in qualified healthcare negatively affect women seeking to terminate their pregnancies."); *Evergreen Ass'n*, 740 F.3d at 239–40 ("Dr. Susan Blank, an Assistant Commissioner at the New York City Department of Health and Mental Hygiene, . . . noted the dangers of delays in access to abortion services and emergency contraception."); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 273 (4th Cir. 2013) ("[T]he risks and costs of abortion increase as a woman advances through her pregnancy.").

18. *See Holtzman*, *supra* note 6, at 88 (discussing the "preliminary threshold deception that women who accidentally visit CPCs believe they are medical clinics").

19. *Id.* at 83 ("Most CPCs are unlicensed facilities and are staffed by volunteers who are not licensed medical professionals. . . . [M]any CPCs require . . . center volunteers and staff to wear white lab coats or medical scrubs. These unlicensed establishments cannot legally provide medical services and instead focus primarily on counseling, having women take pregnancy tests, and in some cases conducting ultrasounds.").

20. Catherine Gamper, *A Chill Wind Blows: Undue Burden in the Wake of Whole Woman's Health v. Hellerstedt*, 76 MD. L. REV. 792, 805 (2017) ("Several federal appellate courts have found laws that require . . . twenty-four- to forty-eight-hour waiting periods . . . do not impose an undue burden on women seeking abortions.").

ended up there through mere happenstance. In *Evergreen Ass'n v. City of New York*, the Second Circuit noted testimony that CPCs are sometimes intentionally located near Planned Parenthood offices and have confusing signage.<sup>21</sup> Or, a CPC bus might be parked in front of a clinic providing abortions—the CPC workers might claim that they work at the clinic or, perhaps, that the clinic is closed but that some services can be provided in the bus.<sup>22</sup> Needless to say, the services provided by the CPC would not include abortion.<sup>23</sup>

Women might mistakenly go to CPCs for an additional reason—a CPC might advertise that it provides abortions.<sup>24</sup> Or, a CPC might arrange for its name to pop up in a prominent place for those doing an internet search using “abortion” as a search term.<sup>25</sup> Precisely because women who seek abortions may have been misled into going to CPCs, states seeking to regulate CPC speech may be doing so in response to what are perceived to be deceptive practices<sup>26</sup>

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21. 740 F.3d at 250 (“Joan Malin, President and CEO of Planned Parenthood, testified that CPCs are often intentionally located in proximity to Planned Parenthood facilities and that they often use misleading names and signage.”).

22. *Id.* (“Mariana Banzil, the Executive Director at Dr. Emily Women’s Health Center, testified about a particular CPC that would park a bus in front of her clinic, from which the CPC’s counselors, often wearing scrubs, would offer ultrasounds, harass Center patients, tell patients that the Center was closed, or identify themselves as Center workers.”).

23. *See supra* note 7 and accompanying text.

24. *See* Daniel J. Faria, *Advertising for Life: CPC Posting Laws and the Case of Baltimore City Ordinance 09-252*, 45 COLUM. J.L. & SOC. PROBS. 379, 386 (2012) (discussing an allegation that such a clinic had “held itself out as an abortion provider in print advertisements”).

25. Holtzman, *supra* note 6, at 86 (“‘Pay-per-click’ advertising allows CPCs to place bids on keywords, such as ‘abortion’ . . . . When users search those keywords on search engines, the advertisement for the highest bidding organization will appear at the top of the page as the first result. . . . Similarly, CPCs are often listed under ‘abortion services’ in phone books.”).

26. *Id.* at 90 (“[T]he City could have used or amended existing regulations regarding fraudulent advertising to combat CPCs’ deceptive advertising campaigns.”). *See also* O’Brien v. Mayor of Balt., 768 F. Supp. 2d 804, 815 (D.

rather than because they want to target a disfavored message.<sup>27</sup> Nonetheless, even if a state is not trying to target a disfavored message by forcing the clinics to post certain information, the chosen means must be sufficiently closely tailored to promote sufficiently important interests if the state's chosen method to combat the deceptive practices is to survive judicial scrutiny.<sup>28</sup> For example, the Second Circuit rejected that a New York City requirement imposed on pregnancy service centers was sufficiently closely tailored to pass constitutional muster.<sup>29</sup>

### B. *Regulation of Commercial Speech*

When discussing whether even deceptive speech can be regulated without offending constitutional guarantees, it is important to characterize the speech. Some kinds of speech fall outside of First Amendment protections,<sup>30</sup> whereas

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Md. 2011) (“Defendants contend that even though the Ordinance applies only to limited-service pregnancy centers who are opposed to abortions and certain methods of birth-control, its purpose is to mitigate the effect of deceptive advertising, not to express disagreement with a particular viewpoint.”), *aff’d sub nom.* Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt., 683 F.3d 539 (4th Cir. 2012), *reh’g en banc granted*, No. 11-1111(L), 2012 WL 7855859 (4th Cir. Aug. 15, 2012), and *aff’d in part, vacated in part*, 721 F.3d 264 (4th Cir. 2013).

27. *See O’Brien*, 768 F. Supp. 2d at 816 (“Defendants enacted the Ordinance out of disagreement with Plaintiffs’ viewpoints on abortion and birth-control.”).

28. *See infra* notes 168–69 and accompanying text (discussing the State’s means-end fit with respect to certain CPC regulations).

29. *See Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014).

30. *See United States v. Alvarez*, 567 U.S. 709, 717 (2012) (naming the exceptions including “advocacy intended, and likely, to incite imminent lawless action,” “obscenity,” “defamation,” “speech integral to criminal conduct,” “fighting words,” “child pornography,” “fraud,” “true threats,” and “speech presenting some grave and imminent threat the government has the power to prevent”). The *Alvarez* Court noted that false statements per se are not unprotected. *See id.* at 718 (“Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements.”). However, it is also true that false statements are not protected for their inherent worth. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its



other kinds of speech like political speech are paradigmatic of what the First Amendment protects.<sup>31</sup> Commercial speech is protected, although not to the same degree as is political speech.<sup>32</sup>

The Court has offered a “four-part analysis” for use in “commercial speech cases.”<sup>33</sup> In order for commercial speech to qualify for protection under the First Amendment, “it at least must concern lawful activity and not be misleading.”<sup>34</sup> Assuming that First Amendment protection has been triggered, “the asserted governmental interest [must be] substantial,”<sup>35</sup> and “the regulation [must] directly advance[] the governmental interest asserted, and . . . not [be] more extensive than is necessary to serve that interest.”<sup>36</sup> However, the Court has explained, the “not more extensive than necessary” requirement is much looser than the literal language might suggest.<sup>37</sup>

Regulations of commercial speech trigger intermediate scrutiny.<sup>38</sup> However, there is some question whether the

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own sake.”).

31. Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037, 1045 (2010) (“Political speech is the paradigmatic example of the content that the First Amendment strives to protect.”).

32. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all.”).

33. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

34. *Id.*

35. *Id.*

36. *Id.*

37. See *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (suggesting that there must be a good fit but rejecting a requirement “that the manner of restriction is absolutely the least severe that will achieve the desired end”).

38. Caren Schmulen Sweetland, *The Demise of a Workable Commercial Speech Doctrine: Dangers of Extending First Amendment Protection to Commercial Disclosure Requirements*, 76 TEX. L. REV. 471, 492 (1997) (“[T]he

advertising used by CPCs should be treated as commercial speech. After all, the services performed are free of charge,<sup>39</sup> so there is a sense in which what is provided should not be thought a commercial transaction but, instead, a gift.<sup>40</sup>

The Court has not provided a clear definition of commercial speech, although the Court has explained that “the core notion of commercial speech [is] ‘speech which does no more than propose a commercial transaction.’”<sup>41</sup> But if the Court’s language about “doing no more than proposing a commercial transaction” is taken literally, then entities wishing to assure that their advertisements receive strong First Amendment protection could simply include some non-commercial information in their advertising. The Court’s language about doing no more than proposing a transaction should not be taken literally—the mere inclusion of a little non-commercial information will not transform what would have been commercial speech into non-commercial speech enjoying full-blown First Amendment protection. One’s “[i]ncluding home economics elements [in kitchen appliance demonstrations would] no more convert[] . . . presentations into educational speech than [would] opening sales presentations with a prayer or a

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commercial speech doctrine dictates that government regulations of commercial speech be subjected to a less strict review than those of political speech, requiring what has been termed an ‘intermediate review’ of the justifications behind commercial regulations.”).

39. Meagan Burrows, *The Cubbyhole Conundrum: First Amendment Doctrine in the Face of Deceptive Crisis Pregnancy Center Speech*, 45 COLUM. HUM. RTS. L. REV. 896, 916 (2014) (“The CPCs, on the other hand, argue that because they are non-profits with no economic motive for service provision, and because they do not employ medical professionals traditionally subject to licensing and regulation by the State, their speech is neither commercial nor professional in nature.”).

40. *Cf.* United States v. Goldberg, No. 87-3162, 1988 WL 63747, at \*3 (9th Cir. June 13, 1988) (suggesting that the “transaction was commercial and not an exchange of gifts”).

41. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

Pledge of Allegiance . . . convert them into religious or political speech.”<sup>42</sup>

The Court has made clear that “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.”<sup>43</sup> However, speech designed to secure an economic advantage is not necessarily treated as merely commercial—the Court has rejected that “speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.”<sup>44</sup> For example, charitable “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.”<sup>45</sup> Thus, speech seeking donations so that individuals can continue to educate the public about important political, social, or economic matters might receive robust protection, notwithstanding that the speech is designed to raise money.

The presence of an economic motivation need not convert fully protected speech into mere commercial speech and the inclusion of noncommercial (fully protected) speech need not transform advertising into fully protected speech—together, these points “illustrate[] the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category.”<sup>46</sup> However, merely because there are no clear bright lines does not establish that no guidance can be given, and it simply is not an option to throw up one’s

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42. *Fox*, 492 U.S. at 474–75.

43. *Bolger*, 463 U.S. at 68 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 n.5 (1980)).

44. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

45. *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

46. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

hands and say that one cannot tell whether speech is commercial or noncommercial. Precisely “[b]ecause the degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or noncommercial speech,”<sup>47</sup> the Court must afford guidance as to which speech counts as commercial and which does not.

In *Bolger v. Youngs Drug Products Corporation*, the Court discussed whether certain pamphlets discussing contraceptives and, in addition, venereal disease and family planning, should be classified as commercial speech, offering the following analysis:

The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech. Similarly, the reference to a specific product does not by itself render the pamphlets commercial speech. Finally, the fact that . . . [there is] an economic motivation for mailing the pamphlets would clearly be insufficient by itself to turn the materials into commercial speech. . . . The combination of *all* these characteristics, however, provides strong support for the . . . conclusion that the informational pamphlets are properly characterized as commercial speech.<sup>48</sup>

Before applying the *Bolger* factors in the CPC context, one matter can be disposed of relatively quickly. The fact that CPCs provide services rather than products does not preclude a finding that they engage in commercial speech—commercial speech need not involve products rather than services.<sup>49</sup> However, CPC activities might seem not to trigger the lower level of scrutiny associated with commercial speech for a different reason, namely, their provision of free services might be thought to preclude the speech from being categorized as commercial.<sup>50</sup> Yet, there

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47. *Bolger*, 463 U.S. at 65.

48. *Id.* at 66–67 (citations omitted).

49. See *Bigelow v. Va.*, 421 U.S. 809, 827 (1975) (stating advertisement of abortion services constituted commercial speech and hence had some First Amendment protection).

50. See Kathryn E. Gilbert, *Commercial Speech in Crisis: Crisis Pregnancy*

are a few reasons that a CPC's refusal to charge for a service might not entitle its speech to the highest level of protection.

CPCs advertise, which meets the first of the *Bolger* factors.<sup>51</sup> Further, CPCs advertise that they provide particular services,<sup>52</sup> which meets the second factor. The more difficult question is whether the CPCs have an economic motivation when providing these free services. But two points might be made with respect to that third factor. First, the Court has not suggested that each of the factors must be met in order to something to qualify as commercial speech,<sup>53</sup> which was one of the reasons that the North Dakota Supreme Court rejected that the provision of free services was dispositive with respect to whether clinic speech might nonetheless qualify as commercial speech and trigger a lower level of scrutiny.<sup>54</sup> Second, CPCs receive

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*Center Regulations and Definitions of Commercial Speech*, 111 MICH. L. REV. 591, 602 (2013) (“[O]ne of the primary problems with the commercial transaction definition is that, in practice, it prevents a court from classifying an offer of free goods or services as ‘commercial speech,’ even though such a finding might be warranted in some cases.”).

51. See *supra* note 48 and accompanying text.

52. Campbell, *supra* note 4, at 87 (“CPC advertisements portray the centers as comprehensive health clinics that offer reproductive health services like contraception and abortion.”); Faria, *supra* note 24, at 384–85 (“CPCs often list themselves in phonebooks under such headings as ‘abortion’ and ‘abortion services,’ advertise themselves under online headings referring to abortion and contraception, or direct staff members to refrain from letting callers know that they will not receive access to contraception or referrals to abortion providers.”).

53. *Bolger*, 463 U.S. at 67 n.14 (“Nor do we mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial.”).

54. *Fargo Women's Health Org. v. Larson*, 381 N.W.2d 176, 180–81 (N.D. 1986) (“Irrespective of the degree, if any, that monies are received by the Help Clinic from its clients we do not believe that factor is dispositive of our determination that the communication involved is commercial speech.”). See also *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 285–86 (4th Cir. 2013) (“[T]he potential commercial nature of speech does not hinge solely on whether the Center has an economic motive, as even *Bolger* does not preclude classification of speech as commercial in the absence of the speaker's economic motivation.”).

funding from other sources to do their work.<sup>55</sup> If that funding is tied to the number of clients served either directly (e.g., receiving a certain amount for each client served) or indirectly (those serving many clients are likely to receive more money than those serving relatively few clients), then CPCs have an economic incentive to increase the number of patients they serve through their advertising,<sup>56</sup> which suggests that all three factors taken together provide strong support for the conclusion that CPC advertising qualifies as commercial advertising.<sup>57</sup> If that is so, then regulations of CPC advertising would be subject to intermediate scrutiny, assuming that it is not deceptive or misleading.<sup>58</sup>

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55. See *Am. Civil Liberties Union of N.C. v. Tata*, 742 F.3d 563, 566 (4th Cir. 2014), *cert. granted, vacated sub nom. Berger v. Am. Civil Liberties Union of N.C.*, 135 S. Ct. 2886 (2015) (“A ‘Choose Life’ plate, like many other specialty license plates, costs a vehicle owner an additional \$25 per year. Of the \$25, \$15 go to the Carolina Pregnancy Care Fellowship, a private organization that supports crisis pregnancy centers in North Carolina.” (citations omitted)); Gallacher, *supra* note 5, at 122–23 (“Both state and federal governments fund pregnancy centers. . . . Between 2001 and 2005, in an effort to promote abstinence, the George W. Bush Administration drastically increased government funding for pregnancy centers by allocating over \$30 million in federal funds to more than fifty pregnancy centers. In addition, states such as Pennsylvania and Texas provide state funding to pregnancy centers through programs like *Alternatives to Abortion*. Thirteen states also permit *Choose Life* license plates and donate a portion of the funds raised from the sale of these plates to pregnancy centers.”).

56. *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017) (“Here, the solicitation of a non-paying client base directly relates to an LSPC’s ability to fundraise. . . . Furthermore, . . . successful advertising directly affects employee compensation. . . . Because LSPCs utilize advertising to maintain a patient base, which in turn can generate income, we conclude that LSPCs have an economic motivation for advertising their services.”).

57. See *supra* note 48 and accompanying text.

58. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”) (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

*C. Regulation of Professional Speech*

An issue related to but distinct from the constitutional limitations on the regulation of commercial speech involves the constitutional limitations on the regulation of professional speech.<sup>59</sup> The Court has discussed the regulation of professional speech in several cases, offering some guidelines with respect to the kinds of limitations that can be imposed without violating constitutional guarantees.<sup>60</sup>

*Village of Schaumburg v. Citizens for a Better Environment* involved “a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for ‘charitable purposes.’”<sup>61</sup> The ordinance was challenged by Citizens for a Better Environment (CBE), who wanted the right to seek donations in the town.<sup>62</sup> The Village denied CBE the right to solicit, because over 60% of the funds collected were used for the benefit of CBE employees.<sup>63</sup> The Village argued that an organization using such a high percentage of the raised funds for itself rather than for charitable purposes is better characterized as an organization raising money for its own private benefit than as a charity.<sup>64</sup>

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59. *King v. Governor of N.J.*, 767 F.3d 216, 233 (3d Cir. 2014), *abrogated by* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) (“In explaining why this level of protection is appropriate, we find it helpful to compare professional speech to commercial speech.”).

60. *See infra* notes 61–128 and accompanying text.

61. 444 U.S. 620, 622 (1980).

62. *Id.* at 625 (“CBE requested permission to solicit contributions in the Village.”).

63. *Id.* at 626 (“The Village also alleged ‘that more than 60% of the funds collected [by CBE] have been spent for benefits of employees and not for any charitable purposes.’”).

64. *Id.* at 633 (“The Village claims, however, that . . . because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.”).

In effect, CBE was soliciting donations so that its employees could continue to inform the public about environmental concerns. The Court noted that “solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues,”<sup>65</sup> and recognized “the reality that without solicitation the flow of such information and advocacy would likely cease.”<sup>66</sup> Precisely because upholding the regulation would in effect make it impossible for the organization to engage in protected First Amendment activities, the Court struck down the regulation.<sup>67</sup>

Five years after deciding *Schaumborg*, the Court decided a case involving the regulation of attorney advertising. In *Zauderer v. Office of Disciplinary Counsel*, the Court examined whether the State of Ohio could “discipline an attorney for soliciting business by running newspaper advertisements containing nondeceptive illustrations and legal advice.”<sup>68</sup>

Zauderer had placed an ad in a newspaper offering to represent defendants in drunk driving cases.<sup>69</sup> The ad suggested that client legal fees would be refunded if the

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65. *Id.* at 632, 635 (discussing “organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern”); *see also* *Sec’y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 949–50 (1984) (striking down a Maryland statute imposing a cap on the expenses associated with charitable fundraising). The Maryland statute was distinguishable from the *Schaumborg* ordinance. *See id.* at 975 (Rehnquist, J., dissenting) (discussing the “Maryland statute, whose primary and legitimate effect is to prohibit professional fundraisers from charging charities a fee of more than 25% of the amount raised”).

66. *Schaumborg*, 444 U.S. at 632.

67. *Id.* at 636 (“[T]he Village’s proffered justifications are inadequate and . . . the ordinance cannot survive scrutiny under the First Amendment.”).

68. 471 U.S. 626, 629 (1985).

69. *Id.* (“[H]e ran a small advertisement in the Columbus Citizen Journal advising its readers that his law firm would represent defendants in drunken driving cases.”).



client was convicted of drunk driving.<sup>70</sup> The attorney was informed that the “advertisement appeared to be an offer to represent criminal defendants on a contingent-fee basis,”<sup>71</sup> which was “a practice prohibited by Disciplinary Rule 2-106(C) of the Ohio Code of Professional Responsibility.”<sup>72</sup> Zauderer withdrew the ad and refused to take on any clients responding to that ad.<sup>73</sup>

Zauderer subsequently placed an ad in over 30 newspapers discussing “his willingness to represent women who had suffered injuries resulting from their use of a contraceptive device known as the Dalkon Shield Intrauterine Device.”<sup>74</sup> This ad was claimed to be deceptive because “any advertisement that mentions contingent-fee rates must ‘disclos[e] whether percentages are computed before or after deduction of court costs and expenses.’”<sup>75</sup> In addition, “the ad’s failure to inform clients that they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful rendered the advertisement ‘deceptive.’”<sup>76</sup>

The *Zauderer* Court explained that “‘commercial speech’ is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive than that afforded ‘noncommercial speech.’”<sup>77</sup> That said, “[t]he States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or

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70. *Id.* at 629–30.

71. *Id.* at 630.

72. *Id.*

73. *Id.* (“Appellant immediately withdrew the advertisement and in a letter to Kettlewell apologized for running it, also stating in the letter that he would decline to accept employment by persons responding to the ad.”).

74. *Id.*

75. *Id.* at 633.

76. *Id.*

77. *Id.* at 637 (citing *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60 (1983)).

misleading,”<sup>78</sup> However, “[c]ommercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.”<sup>79</sup> While rejecting that “appellant’s statements regarding the Dalkon Shield were . . . false or deceptive,”<sup>80</sup> the Court was more sympathetic to the state’s claim that consumers might be confused by the failure to specify “purely factual and uncontroversial information about the terms under which his services will be available.”<sup>81</sup> Further, the “appellant’s constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,”<sup>82</sup> and because “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech, ‘warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.’”<sup>83</sup>

*Zauderer* is important for several reasons. It reaffirms that states have great leeway when seeking to regulate deceptive advertising, and imposes intermediate (rather than strict) scrutiny when examining non-deceptive commercial speech. Further, it minimizes the burden imposed by a state requirement that *Zauderer* provide factual information that might clear up misconceptions, even though the provision of that information might thwart his purposes by reducing the number of individuals seeking legal services.

While *Zauderer*’s claims were not inherently

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78. *Id.* at 638 (citing *Friedman v. Rogers*, 440 U.S. 1 (1979)).

79. *Id.* (citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)).

80. *Id.* at 641.

81. *Id.* at 651.

82. *Id.*

83. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

misleading,<sup>84</sup> he was still appropriately disciplined for failing to disclose that clients unsuccessfully bringing a tort claim might still be responsible for “costs” rather than “legal fees.”<sup>85</sup> The Court did not cite to any actual instances of confusion, instead merely noting that “to a layman not aware of the meaning of these terms of art, the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge.”<sup>86</sup> To refute the charge that such a worry was merely “speculative,”<sup>87</sup> the Court explained that “it is a commonplace that members of the public are often unaware of the technical meanings of such terms as ‘fees’ and ‘costs’—terms that, in ordinary usage, might well be virtually interchangeable.”<sup>88</sup> Where it is obvious that “substantial numbers of potential clients would be . . . misled,”<sup>89</sup> and “[w]hen the possibility of deception is as self-evident as it is in this case, [the Court does] . . . not require the State to ‘conduct a survey of the . . . public before it [may] determine that the [advertisement] had a tendency to mislead.’”<sup>90</sup> While speech in the commercial context still triggers First Amendment guarantees,<sup>91</sup> “rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing

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84. *Id.* at 641 (“The State’s power to prohibit advertising that is ‘inherently misleading,’ thus cannot justify Ohio’s decision to discipline appellant for running advertising geared to persons with a specific legal problem.” (citing *R.M.J.*, 455 U.S. at 203)).

85. *Id.* at 652.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 652–53 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 391–92 (1965)).

91. *See supra* notes 32–37 and accompanying text.

deception of consumers.”<sup>92</sup> *Zauderer* thus seems to represent a relatively deferential approach to state regulations of commercial speech, where the State “has only required [individuals] to provide somewhat more information than they might otherwise be inclined to present”<sup>93</sup> as a means of “dissipat[ing] the possibility of consumer confusion or deception.”<sup>94</sup>

In *Riley v. National Fed’n of the Blind of N.C., Inc.*, the Court addressed a disclosure law imposed on professional fundraisers that was designed to take into account some of the concerns addressed in *Schaumborg*.<sup>95</sup> The North Carolina law specified:

A fee up to 20% of the gross receipts collected is deemed reasonable. If the fee retained is between 20% and 35%, the Act deems it unreasonable upon a showing that the solicitation at issue did not involve the “dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation.” Finally, a fee exceeding 35% is presumed unreasonable, but the fundraiser may rebut the presumption by showing that the amount of the fee was necessary either (1) because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or (2) because otherwise the charity’s ability to raise money or communicate would be significantly diminished.<sup>96</sup>

The North Carolina law seemed to take into account some of the points previously made by the Court, recognizing that greater flexibility might be required where the solicitation involved the “dissemination of information, discussion, or advocacy relating to public issues”<sup>97</sup> or “because otherwise the charity’s ability to raise money or

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92. *Zauderer*, 471 U.S. at 651.

93. *Id.* at 650.

94. *Id.* at 651 (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

95. 487 U.S. 781, 784, 787, 795–96 (1988). *See also supra* notes 61–67 and accompanying text.

96. *Id.* at 784–86 (quoting N.C. GEN. STAT. § 131C (1986)).

97. *Id.* at 785.

communicate would be significantly diminished.”<sup>98</sup> But the Court rejected “the State’s argument . . . that its three-tiered, percentage-based definition of ‘unreasonable’ passes constitutional muster,”<sup>99</sup> reasoning that “the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s interest in preventing fraud.”<sup>100</sup> Part of the justification for striking down the law was that the State had other tools at its disposal: “North Carolina has an antifraud law, and . . . law enforcement officers are ready and able to enforce it.”<sup>101</sup> In addition, “North Carolina may constitutionally require fundraisers to disclose certain financial information to the State.”<sup>102</sup>

The Court contrasted the requirement that fundraisers make certain disclosures to the State with the requirement that fundraisers, themselves, make certain disclosures to prospective donors. When evaluating “the requirement that professional fundraisers disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity,”<sup>103</sup> the Court noted that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.”<sup>104</sup> Yet, Zauderer had been required to disclose certain matters in his advertising that he would not otherwise have mentioned,<sup>105</sup> so the fact that North Carolina was mandating speech did not alone make such a requirement constitutionally offensive. Further, just as the

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98. *Id.* at 785–86.

99. *Id.* at 789.

100. *Id.*

101. *Id.* at 795.

102. *Id.*

103. *Id.*

104. *Id.*

105. *See supra* notes 81–83 and accompanying text.

requirement placed on Zauderer was designed to clear up possible misconceptions about the terms under which his services were available, the requirement placed on the professional fundraiser might clear up misconceptions about how much of the donation would actually go to charity.

What was at issue in *Riley* was professional speech, but the Court did not accept that “a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking.”<sup>106</sup> In any event, even commercial speech may not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech.”<sup>107</sup> Here, when discussing the “commercial character” of speech, the Court was referring to an aspect of the speech that would make it subject to *less* rigorous review.<sup>108</sup>

The *Riley* Court understood that people might want to know the degree to which previously raised funds had been used for charitable purposes,<sup>109</sup> and also understood that the State was merely requiring “full disclosure.”<sup>110</sup> However, the North Carolina requirement was not immune from invalidation merely because it involved “compelled statements of ‘fact.’”<sup>111</sup> For example, the Court would not “immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects,”<sup>112</sup> notwithstanding that “the foregoing factual information

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106. *Riley*, 487 U.S. at 795.

107. *Id.* at 796.

108. *See supra* note 77 and accompanying text.

109. *See Riley*, 487 U.S. at 800 (noting that “the potential donor [might be] unhappy with the disclosed percentage”).

110. *Id.* at 798.

111. *Id.* at 797.

112. *Id.* at 798.

might be relevant to the listener.”<sup>113</sup> Such “a law compelling . . . disclosure would clearly and substantially burden the protected speech.”<sup>114</sup>

When considering the constitutionality of regulations, the Court looks at whether individual rights are burdened,<sup>115</sup> and also at whether the regulation is sufficiently closely tailored to promote a sufficiently important state interest.<sup>116</sup> But one of the ways to determine if a statute is sufficiently closely tailored is to see whether the same goals can be accomplished in a way that does not impose such a burden on the First Amendment.<sup>117</sup> For example, rather than require all fundraisers to discuss the percentage of raised monies that were devoted to noncharitable purposes, the State might simply require that a potential donor asking about the percentage of raised funds going to noncharitable purposes be supplied with the requested information.<sup>118</sup> Or, another alternative would be to have “the State . . . itself publish the detailed financial disclosure forms it requires professional fundraisers to file.”<sup>119</sup> Or, the State could “vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining

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113. *Id.*

114. *Id.*

115. *See id.*

116. *See, e.g.,* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (“The State’s interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment.”).

117. *See, e.g.,* 44 Liquormart, Inc. v. R.I., 517 U.S. 484, 507 (1996) (“The State also cannot satisfy the requirement that its restriction on speech be no more extensive than necessary. It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal of promoting temperance.”).

118. *Riley*, 487 U.S. at 799 (“[A] donor is free to inquire how much of the contribution will be turned over to the charity. Under another North Carolina statute, also unchallenged, fundraisers must disclose this information upon request.” (citing N.C. GEN. STAT. § 131C-16 (1986))).

119. *Id.* at 800.

money on false pretenses or by making false statements.”<sup>120</sup> The State’s having all of these alternatives that imposed less of a burden on the First Amendment suggested that North Carolina’s chosen means was not sufficiently closely tailored to achieve the desired end.

*Riley* must be reconciled with *Zauderer* with respect to the kinds of speech the government might compel without violating constitutional guarantees—*Riley* concerned compelled disclosure of fully protected speech,<sup>121</sup> whereas *Zauderer* concerned compelled disclosure in a commercial context where there would have been a real likelihood of confusion were the required information not included.<sup>122</sup> However, that is not the only way to distinguish the cases. Another way focuses on the target of the regulation—professional fundraisers versus attorneys—although the Court made clear in a subsequent case that it was not merely distinguishing among occupations.

*Gentile v. State Bar of Nevada* involved an alleged violation of the Nevada Rules regarding attorney conduct.<sup>123</sup> Hours after his client had been indicted, attorney Dominic Gentile made a statement to the press alleging that his client was being scapegoated and that the State was not going after the real culprits, the police.<sup>124</sup>

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120. *Id.*

121. *Id.* at 796 (“[W]e apply our test for fully protected expression.”).

122. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (“[A]n advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.”).

123. 501 U.S. 1030, 1033 (1991) (“The State Bar of Nevada then filed a complaint against petitioner, alleging a violation of Nevada Supreme Court Rule 177, a rule governing pretrial publicity almost identical to ABA Model Rule of Professional Conduct 3.6.”).

124. *Id.* at 1034 (“The State Bar of Nevada reprimanded petitioner for his assertion, supported by a brief sketch of his client’s defense, that the State sought the indictment and conviction of an innocent man as a ‘scapegoat’ and had not ‘been honest enough to indict the people who did it; the police department, crooked cops.’”).



Gentile's client was subsequently exonerated.<sup>125</sup>

The *Gentile* Court characterized the attorney speech as political, noting that "speech critical of the exercise of the State's power lies at the very center of the First Amendment."<sup>126</sup> The Court explained that "disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment,"<sup>127</sup> and in any event that the attorney "spoke at a time and in a manner that neither in law nor in fact created any threat of real prejudice to his client's right to a fair trial or to the State's interest in the enforcement of its criminal laws."<sup>128</sup> The Court struck down the Nevada rule, at least "[a]s interpreted by the Nevada Supreme Court."<sup>129</sup>

Whether discussing regulations of professional fundraisers or attorneys, the Court's professional speech cases distinguish between (deceptive) advertising on the one hand and political (or similarly protected) speech on the other. The circuit courts have considered the Court's cases on professional speech, and have come up with a different kind of approach to evaluating the constitutionality of professional speech regulation.

At issue in *King v. Governor of New Jersey* was a New Jersey law "prohibit[ing] licensed counselors from engaging in 'sexual orientation change efforts' with a client under the age of 18."<sup>130</sup> Those challenging the law were "New Jersey licensed counselors and founders of Christian counseling centers that offer counseling on a variety of issues, including sexual orientation change, from a religious

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125. *Id.* at 1033 ("Some six months later, the criminal case was tried to a jury and the client was acquitted on all counts.").

126. *Id.* at 1034.

127. *Id.* at 1054.

128. *Id.* at 1033.

129. *Id.* at 1048.

130. 767 F.3d 216, 220 (3d Cir. 2014), *abrogated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

perspective.”<sup>131</sup>

The Legislature justified its prohibition by noting that having a same-sex sexual orientation is not an illness,<sup>132</sup> and that attempts to modify orientation are not only ineffective but also pose a significant risk of harm.<sup>133</sup> Because the therapy at issue only involved “talk therapy” that is administered solely through verbal communication,<sup>134</sup> the Third Circuit reasoned that the communication was “speech that enjoys some degree of protection under the First Amendment.”<sup>135</sup> However, because the plaintiffs were “speaking as state-licensed professionals within the confines of a professional relationship, . . . [the] level of protection [wa]s diminished.”<sup>136</sup> Given this lower standard, the statute passe[d] muster “if it directly advance[d] the State’s substantial interest in protecting its citizens from harmful or ineffective professional practices and [wa]s not more extensive than necessary to serve that interest.”<sup>137</sup> The court upheld the regulation.<sup>138</sup>

The Ninth Circuit examined a California law banning “state-licensed mental health providers from engaging in ‘sexual orientation change efforts’ (‘SOCE’) with patients under 18 years of age.”<sup>139</sup> The California Legislature, like the New Jersey Legislature, had two justifications: the treatment was ineffective and posed a risk of serious

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131. *Id.* at 220–21.

132. *Id.* at 221 (“The New Jersey legislature found that ‘being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming.’”)

133. *Id.* at 222 (“Many of these sources emphasized that such efforts are ineffective and/or carry a significant risk of harm.”).

134. *Id.* at 221.

135. *Id.* at 224.

136. *Id.*

137. *Id.*

138. *Id.* at 238 (“New Jersey has satisfied this burden.”).

139. *Pickup v. Brown*, 728 F.3d 1042, 1048 (9th Cir. 2013).

harm.<sup>140</sup> Upholding the ban,<sup>141</sup> the Ninth Circuit concluded that the fact that therapy only involved speech posed no bar to the legislature's ban,<sup>142</sup> noting that tort liability attaches to the negligent provision of medical advice and that the First Amendment does not bar the imposition of such liability.<sup>143</sup> But medical advice is speech, and the fact that a professional is merely talking does not immunize such speech from sanction. That said, however, states presumably have a compelling interest in preventing professionals from offering medical advice that might lead to harm,<sup>144</sup> so the fact that states are not precluded by constitutional guarantees from sanctioning doctors who put their clients at risk does not establish that such regulations only pass muster under lower level scrutiny.

So, too, while the circuits used a lower level of scrutiny when upholding statutes precluding physicians from using talk therapy to change a minor's sexual orientation,<sup>145</sup> those statutes might well have been upheld even had a higher level of scrutiny been employed. States have a compelling

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140. *Id.* at 1050 (“The legislature relied on the well documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it.”).

141. *Id.* at 1057 (“The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18.”).

142. *Id.* at 1056 (“We further conclude that the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone.”).

143. *Id.* at 1054 (“[D]octors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care.”). *See also* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018) (“Longstanding torts for professional malpractice, for example, ‘fall within the traditional purview of state regulation of professional conduct.’” (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))).

144. *Cf.* Fett v. Med. Bd. of Cal., 199 Cal. Rptr. 3d 196, 207 (Cal. Ct. App. 2016) (“[T]he state has a compelling interest in ensuring that the medical care provided by Board certified doctors conforms to the standard of care.”).

145. *See supra* notes 136–37, 141–43 and accompanying text.

interest in protecting the health of the populace,<sup>146</sup> and prohibitions on treatments that are not only ineffective but also pose a risk of significant harm are closely tailored to promoting that state interest.<sup>147</sup> Thus, even if the circuits' professional speech standard is viewed as too forgiving,<sup>148</sup> that does not mean that laws precluding ineffective and potentially harmful talk-treatments are therefore unconstitutional.

### III. *BECERRA*

California law required CPCs to post certain information. That requirement was successfully challenged as a violation of First Amendment guarantees. The holding itself may be less surprising than the *Becerra* Court's supporting rationales, which may have implications for CPCs in particular and First Amendment law more generally that the Court may be unwilling to endorse.

#### A. *California Regulation of CPCs*

The California Legislature passed the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act), which required licensed CPCs to post a notice explaining that California provides free or low-cost services, including abortions,<sup>149</sup> and unlicensed centers to post a notice explaining that they

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146. *E.g.*, *Ohio Bd. of Dietetics v. Brown*, 614 N.E.2d 855, 860 (Ohio Ct. App. 1993) (“[T]he state has a compelling interest in the health and welfare of its citizens.”).

147. *Cf. Pickup v. Brown*, 42 F. Supp. 3d 1347, 1375 (E.D. Cal. 2012) (noting the claim that the statute prohibiting SOCE therapy was well-suited to promoting this compelling state interest), *aff'd*, 728 F.3d 1042 (9th Cir. 2013), *and aff'd*, 740 F.3d 1208 (9th Cir. 2014).

148. *See infra* notes 171–75 and accompanying text.

149. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368 (2018) (“Licensed clinics must notify women that California provides free or low-cost services, including abortions, and give them a phone number to call.”).

were not licensed to provide medical services.<sup>150</sup> The California Legislature justified the requirement by noting that many women were unaware of their options, and that those who might consider an abortion were in a time-sensitive situation in which it might be important for them to receive the information in a timely way.<sup>151</sup>

The *Becerra* Court implied that the Legislature passed this act because it disapproved of pregnancy center opposition to abortion.<sup>152</sup> For example, the Court noted that the author of the Act had written, “‘unfortunately,’ . . . there are nearly 200 licensed and unlicensed crisis pregnancy centers in California . . . [who] ‘aim to discourage and prevent women from seeking abortions.’”<sup>153</sup> The Court continued, “To address this perceived problem, the FACT Act imposes two notice requirements on facilities that provide pregnancy-related services—one for licensed facilities and one for unlicensed facilities.”<sup>154</sup> If, indeed, it is “unfortunate” that CPCs exist in California and if “this perceived problem” refers to the centers’ opposition to abortion, then it is hardly surprising that the Court held the statute unconstitutional—viewpoint discrimination is very unlikely to pass constitutional muster.<sup>155</sup>

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150. *Id.* (“Unlicensed clinics must notify women that California has not licensed the clinics to provide medical services.”).

151. *Id.* at 2369 (“The Legislature posited that ‘thousands of women remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, abortion, or delivery’ . . . [and cited] the ‘time sensitive’ nature of pregnancy-related decisions . . .”).

152. *See id.* at 2370–71 n.2 (“Petitioners raise serious concerns that both the licensed and unlicensed notices discriminate based on viewpoint.”); *see also id.* at 2378 (Kennedy, J., concurring) (“This separate writing seeks to underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern.”).

153. *Id.* at 2368 (majority opinion).

154. *Id.*

155. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the

Yet, the Court's analysis was not based on the state's having engaged in viewpoint discrimination.<sup>156</sup> Instead, the Court separately analyzed the regulations regarding licensed versus unlicensed facilities, discussing why neither requirement was likely to pass constitutional muster.<sup>157</sup>

### B. *Licensed Clinics*

The licensed clinics were required to post a sign specifying "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women."<sup>158</sup> The notice was to "be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in,"<sup>159</sup> and it was to "be in English and any additional languages identified by state law."<sup>160</sup>

The *Becerra* Court explained that the "licensed notice is a content-based regulation of speech,"<sup>161</sup> and that "such notices 'alte[r] the content of [their] speech.'"<sup>162</sup> Further, the clinics were not even allowed to use their own phraseology—"licensed clinics must provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain

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specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.").

156. *Becerra*, 138 S. Ct. at 2378 (Kennedy, J., concurring) ("[T]he apparent viewpoint discrimination here is a matter of serious constitutional concern. . . . The Court, in my view, is correct not to reach this question.").

157. *Id.* at 2376 (majority opinion) ("In short, petitioners are likely to succeed on the merits of their challenge to the licensed notice."); *id.* at 2378 ("[T]he unlicensed notice is unjustified and unduly burdensome under *Zauderer*.").

158. *Id.* at 2369.

159. *Id.*

160. *Id.*

161. *Id.* at 2371.

162. *Id.* (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

them.”<sup>163</sup> To add insult to injury, “[o]ne of those [state-sponsored] services [wa]s abortion—the very practice that petitioners are devoted to opposing.”<sup>164</sup> Not only was the clinics’ message altered—“[b]y compelling individuals to speak a particular message, such notices “alte[r] the content of [their] speech”<sup>165</sup>—but the new message was allegedly the exact opposite of what the clinics wished to say.

Yet, the Court’s implicit claim that the clinic’s message was changed with respect to “the very practice that petitioners are devoted to opposing”<sup>166</sup> was not entirely accurate. The State was not requiring the clinics to promote abortion but merely to mention that the State provides abortion services. Such a posting would not undermine the clinic’s position that abortion is wrong or that abortions can be detrimental but, instead, would merely inform women of the factual claim that the State provides such services.

Nonetheless, even if the requirement merely involved the provision of factual information so that patients would be more fully informed, that would not immunize the requirement from invalidation.<sup>167</sup> *Riley* struck down a requirement that professional fundraisers reveal certain information, notwithstanding that the information was factual and that the State wanted to promote full disclosure.<sup>168</sup> Just as North Carolina could itself have published the information that it wanted the professional fundraisers to divulge, California could itself publish that it

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163. *Id.*

164. *Id.*

165. *Id.* (citing *Riley*, 487 U.S. at 795).

166. *Id.*

167. A separate question is whether the requirement that this information be provided in this context passes constitutional muster. See *supra* notes 95–120 and accompanying text.

168. *Riley*, 487 U.S. at 798; see also *infra* notes 169–170 and accompanying text.

provided low-cost or no-cost abortions for eligible women.<sup>169</sup> But if that is so, then California had another alternative that would have imposed less of a burden on First Amendment guarantees.<sup>170</sup>

When analyzing whether the California statute passed muster, the *Becerra* Court dispensed with the professional speech analysis relatively quickly. The Court noted that some of the circuit courts had “recognized ‘professional speech’ as a separate category of speech that is subject to different rules.”<sup>171</sup> But professional speech is not “a separate category of speech”<sup>172</sup> and, further, speech is not “unprotected merely because it is uttered by ‘professionals.’”<sup>173</sup> While the circuits were not saying that anyway,<sup>174</sup> the Court was correct that such an approach did not capture Supreme Court precedent.<sup>175</sup>

The Court’s having set up a straw man to strike down<sup>176</sup> might seem relatively harmless, because states would be unlikely to claim that the speech of professionals

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169. *Becerra*, 138 S. Ct. at 2376 (noting that California “could inform the women itself with a public-information campaign”).

170. *Id.* (“California could inform low-income women about its services ‘without burdening a speaker with unwanted speech.’”) (citing *Riley*, 487 U.S. at 800).

171. *Id.* at 2371 (citing *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014); *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 568–570 (4th Cir. 2013)).

172. *Becerra*, 138 S. Ct. at 2371.

173. *Id.* at 2371–72.

174. *See King*, 767 F.3d at 226, *abrogated by* Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361 (2018) (“*Pickup* explained that ‘the First Amendment rights of professionals, such as doctors and mental health providers’ exist on a ‘continuum.’ On this ‘continuum,’ First Amendment protection is greatest ‘where a professional is engaged in a public dialogue.’” (citations omitted)).

175. *Becerra*, 138 S. Ct. at 2372.

176. *See supra* note 174 and accompanying text (noting that the rejected doctrine had not been adopted by the circuits).



enjoys no constitutional protection anyway.<sup>177</sup> Professionals engaging in speech might well not be offering professional speech,<sup>178</sup> for example, writing an op ed in a local newspaper,<sup>179</sup> and so might well enjoy certain protections that might not apply to the conversations with patients about which treatment would be best.<sup>180</sup> Nonetheless, the Court's implicit analysis may provide the basis for challenging state-mandated language that the Court had

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177. A separate issue involves the degree to which professional speech to and with a client is subject to regulation. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 834 (1999) ("[T]he Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional's freedom to speak to a client."); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (2007) (discussion "regulat[ion] [of] communication between a doctor and a patient that occurs in the course of ongoing medical treatment . . . [which] I shall call 'professional speech.'"). Justice White offered a different view on professional speech. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."). However, this would seem to make Gentile's speech subject to more regulation. See *supra* note 124 and accompanying text (discussing how his clients was allegedly being railroaded by the State). When Gentile engaged in political speech by suggesting that the true culprits in that case—the police—were not being investigated, see *supra* notes 124–25 and accompanying text, he was likely doing so after having taken his client's individual needs into account and after having considered what would benefit his client. But the Court rejected Nevada's claim that that it could subject Gentile to sanction for having engaged in this professional practice, although the Court might be interpreted to have been denying that Gentile had in fact acted in a way that would undermine the State's interest in the enforcement of its laws. See *supra* note 127 and accompanying text.

178. See Post, *supra* note 177, at 948 (distinguishing between "speech by a professional and professional speech").

179. See *id.* (discussing an op-ed about amalgam fillings written by a dentist who had agreed to limit what he said about such fillings when talking to his patients).

180. *Id.* at 949 ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment. But when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine.").

heretofore implied passed constitutional muster.<sup>181</sup>

The *Becerra* Court noted that it has upheld compelled disclosure in some contexts,<sup>182</sup> but claimed that the “*Zauderer* standard does not apply,”<sup>183</sup> explaining that “the licensed notice is not limited to ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”<sup>184</sup> The Court then suggested that *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*<sup>185</sup> supported the *Becerra* Court’s interpretation of *Zauderer*. Because the required “notice in no way relates to the services that licensed clinics provide [but] [i]nstead . . . requires these clinics to disclose information about state-sponsored services, . . . *Zauderer* has no application here.”<sup>186</sup>

Here, the *Becerra* Court suggested that the only information that could be required was information about the terms under which the clinic’s services will be available. But *Hurley* does not support the Court’s limited interpretation<sup>187</sup> and, further, the Court’s interpretation may have important implications in the context of regulating what must be said when women seek abortions.<sup>188</sup>

In *Hurley*, the Court offered its understanding of *Zauderer*, explaining that “the State may at times . . .

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181. See *infra* notes 270–72 and accompanying text (discussing state-mandated abortion language).

182. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018) (“This Court’s precedents have applied a lower level of scrutiny to laws that compel disclosures in certain contexts.”).

183. *Id.*

184. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

185. 515 U.S. 557 (1995).

186. *Id.*

187. See *infra* notes 189–95 and accompanying text.

188. See *infra* notes 265–69 and accompanying text.

require[e] the dissemination of ‘purely factual and uncontroversial information.’”<sup>189</sup> Outside the commercial context, however,<sup>190</sup> the State “may not compel affirmance of a belief with which the speaker disagrees.”<sup>191</sup>

More must be said about the conditions under which affirmance may not be compelled. One interpretation of such a limitation is that the State is precluded from forcing an individual to affirm beliefs that the individual does not hold. But that limitation may be less robust than first appears. For example, the CPCs were not being asked to affirm anything with which they disagreed—they were merely being asked to affirm that the State did something (provide abortions) of which they disapproved.

*Hurley* had quoted *Zauderer* to suggest that the State may “prescribe what shall be orthodox in commercial advertising,”<sup>192</sup> and also noted the “general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”<sup>193</sup> This general rule, if applicable to the CPCs, would preclude their being forced to articulate statements of fact that they wanted to avoid, for example, that the State of California provides no-cost or low-cost abortions.

To see whether this general rule protects the CPCs, *Zauderer* must be explicated more clearly. If *Zauderer* is distinguishing between commercial advertising and everything else such that only commercial advertising is less protected, then the State might be precluded from

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189. 515 U.S. at 573 (quoting *Zauderer*, 471 U.S. at 651).

190. *See id.*; *see also* *United States v. United Foods, Inc.*, 533 U.S. 405, 424 (2001) (explaining that *Zauderer* “refus[es] to apply *Wooley* [*Wooley v. Maynard*, 430 U.S. 705 (1977)] and *Barnette* [W. Va. Bd. of Ed. v. *Barnette*, 319 U.S. 624 (1943)] in a commercial context”).

191. *See Hurley*, 515 U.S. at 573.

192. *Id.* (quoting *Zauderer*, 471 U.S. at 651).

193. *Id.* (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341–42 (1995)).

forcing the CPCs to make the objectionable statements of fact. However, suppose that *Zauderer* is distinguishing between commercial and noncommercial speech. Suppose further that the CPCs' speech about which services they and the State provide count as commercial speech. Then the general rule about not being forced to articulate statements of fact the speaker would prefer to avoid may not be applicable to the CPCs.

The *Hurley* Court cited to *Riley*,<sup>194</sup> which involved the difference between fully protected speech (even though it involved solicitation) and less protected, commercial speech,<sup>195</sup> thereby suggesting that the relevant difference was between commercial and noncommercial speech rather than on advertising speech in particular versus other kinds of speech. But if that is so, then *Zauderer*, understood in light of *Hurley*<sup>196</sup> and *Riley*,<sup>197</sup> is likely distinguishing between commercial and noncommercial speech. Where commercial services are provided and a substantial number of clients are or might be misled, “warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception.”<sup>198</sup> The jurisprudence preceding *Becerra* does not suggest that CPCs cannot be forced to articulate statements of fact that they would prefer to avoid.

Perhaps *Becerra* is reformulating the jurisprudence to suggest that the State's power to compel speech is more limited than previously thought—perhaps lower scrutiny will only be applied to regulations of advertising rather

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194. *See id.* at 573–74 (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988)).

195. *See supra* note 115 and accompanying text (discussing *Riley*).

196. *See supra* notes 189–93 and accompanying text.

197. *See supra* notes 94–121 and accompanying text.

198. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

than to commercial speech more generally.<sup>199</sup> Perhaps in addition, the State is only permitted to require purely factual and uncontroversial information about the services actually provided rather than other kinds of information that a speaker would prefer not to mention. However, such a limitation on what entities can be required to say will become more and more restrictive depending upon how few services are provided or, perhaps, which claims are accepted as noncontroversial.<sup>200</sup>

### C. *Unlicensed Clinics*

California law required unlicensed clinics to post a “government-drafted notice stating that ‘[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.’”<sup>201</sup> The notice had to be “on site and in all advertising materials,”<sup>202</sup> and was to be “posted in English and as many other languages as California chooses to require.”<sup>203</sup>

The Court was suspicious that California was targeting certain clinics, noting that “[t]he unlicensed notice applies only to facilities that primarily provide ‘pregnancy-related’ services,”<sup>204</sup> which was “a curiously narrow subset of speakers.”<sup>205</sup> For example, the Court noted that a “facility across the street that advertises and provides nonprescription contraceptives is excluded [from the

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199. See *supra* note 192 (quoting *Zauderer* about regulating what is orthodox in advertising).

200. See *infra* note 267 and accompanying text (noting the *Becerra* Court’s point that abortion is a controversial subject).

201. Nat’l Inst. of Family & Life Advocates v. *Becerra*, 138 S. Ct. 2361, 2370 (2018) (quoting CAL. HEALTH & SAFETY CODE ANN. § 123472(b)(1)).

202. *Id.* (citing CAL. HEALTH & SAFETY CODE §§ 123472(b)(2), (3)).

203. *Id.* at 2378.

204. *Id.* (citing CAL. HEALTH & SAFETY CODE § 123471(b).)

205. *Id.* at 2377.

requirement that it advertise that it is unlicensed]—even though the latter is no less likely to make women think it is licensed.”<sup>206</sup> The Court failed to mention that unlike those facilities providing contraceptives, many of the CPCs engaged in deceptive practices.<sup>207</sup>

California had some difficulty in offering a plausible justification for its requirement. At oral argument, the State denied that “the justification for the FACT Act was that women ‘go into [crisis pregnancy centers] and they don’t realize what they are.’”<sup>208</sup> Presumably, this justification was not offered because it would have been inaccurate to claim that *no* women knew which services were actually provided at such centers. After all, *some* of the CPCs are quite forthright in describing the services that they do or do not provide,<sup>209</sup> so there is less reason to think that *all* of the women going into such centers would be confused about which services were provided.

Yet, misunderstandings about which services are actually provided at the clinics would likely continue even if some clinics accurately advertise which services they provide. Women who did not see the accurate advertising but nonetheless went to the center whether because of misleading signage<sup>210</sup> or because of word-of-mouth might not be aware of the limited services provided. Further, even if some centers are forthright about the services they provide, other centers are not. Some of the latter centers

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206. *Id.* at 2378.

207. Nat’l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 843 (9th Cir. 2016) (discussing “the Legislature’s findings regarding . . . CPCs, which often present misleading information to women about reproductive medical services”), *rev’d sub nom.* Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018).

208. *Becerra*, 138 S. Ct. at 2377.

209. *See* First Resort, Inc. v. Herrera, 860 F.3d 1263, 1269 (9th Cir. 2017).

210. *See supra* note 21 and accompanying text (noting that some centers have misleading signage or purposely locate near clinics providing abortions so that individuals might mistakenly go to a crisis pregnancy center while thinking that they had gone to a clinic providing abortion services).

suggest that they offer abortion services,<sup>211</sup> so it would be unsurprising for *some* women who go to such centers to be confused about which services are actually provided.

California's announced justification was to assure that "pregnant women in California know when they are getting medical care from licensed professionals."<sup>212</sup> In the Court's view, California had not "demonstrated any justification for the unlicensed notice that is more than 'purely hypothetical.'"<sup>213</sup> But the Court's characterization of California's rationale was surprising—a legislative finding of deceptive advertising<sup>214</sup> provides more than a "purely hypothetical" basis for the law.

Consider *Zauderer*, where the Court refused to label Ohio's worry about possible consumer confusion as purely hypothetical, instead suggesting that individuals might be expected to fail to distinguish between fees and costs.<sup>215</sup> Yet, individuals who saw workers dressed in white coats or scrubs<sup>216</sup> might well be misled into believing that doctors were present even if in fact that was not so, and it should not be necessary to conduct a survey<sup>217</sup> to recognize the

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211. *Cf. First Resort*, 860 F.3d at 1276–77 (“[T]he clinic’s website included ‘detailed information about abortion procedures offered at outpatient medical clinics’ and ‘implied on its ‘Abortion Procedures’ page that First Resort perform[ed] pregnancy tests and ultrasounds as a prelude to offering abortion as an outpatient procedure, or referring clients to a provider who performs abortions.’ . . . First Resort . . . conceals from the public the fact that First Resort neither performed abortions nor referred clients to abortion providers.”).

212. *Becerra*, 138 S. Ct. at 2377 (quoting 2015 Cal. Legis. Serv., § 1(e)).

213. *Id.* at 2377.

214. *See supra* note 176 and accompanying text.

215. *See supra* notes 85–90 and accompanying text (discussing Ohio’s worry that the public might not understand the conditions under which the attorney’s services were being provided).

216. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1341 (2014) (“The people who work there, even those who are not medical professionals, wear scrubs or white lab coats, just like doctors and nurses.”).

217. *Cf. supra* notes 89–90 and accompanying text (discussing how the *Zauderer* Court declined to require survey evidence).

likelihood that such confusion would occur.<sup>218</sup>

Even if some women would not understand which services were provided at a particular clinic, a separate question involves what steps may be taken by the State to ameliorate that problem. The California legislation had required *all* unlicensed pregnancy centers to post a “government-drafted statement,”<sup>219</sup> even if the pregnancy center itself had noted that it did not provide abortions.<sup>220</sup> Requiring clinics to post government-prescribed language (especially where the clinic had itself addressed the relevant concerns) might seem to be a rather intrusive step, although California likely thought that its regulation requiring unlicensed clinics to self-identify as unlicensed would pass muster after *Riley*.<sup>221</sup>

In *Riley*, the Court noted that “nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny.”<sup>222</sup> *Riley* at least suggests that requiring an

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218. See Dep’t of Civil Rights *ex rel.* Cornell v. Edward W. Sparrow Hosp. Ass’n, 377 N.W.2d 755, 764 (Mich. 1985) (“Sparrow Hospital imposed two different dress codes on its laboratory technologists, a male dress code and a female dress code. The codes were intentionally designed to reinforce sexual stereotypes: men were dressed to look like doctors, and women were dressed to look like nurses.”); *id.* at 757 (“Male technologists, on the other hand, were permitted to wear a white laboratory coat over ordinary street clothing. The laboratory director testified that the dress code was justified because patients were used to seeing males dressed like doctors and females dressed like nurses.”). See also Rory R. Olsen, *Who Woke the Sleeping Firefighter?*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 275, 285 (2010) (noting that “[t]he SS (Nazi paramilitary corps) staff in charge of the transports donned white coats to keep up the charade of a medical procedure”).

219. Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2378 (2018).

220. See *id.* at 2377 (“It requires covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements.”).

221. For a discussion of *Riley*, see *supra* notes 81–104 and accompanying text.

222. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 n.11 (1988).



unlicensed clinic to disclose its unlicensed status passes constitutional muster. Indeed, the Second Circuit upheld a requirement that “pregnancy services centers to disclose whether or not they ‘have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy services center,’”<sup>223</sup> citing *Riley* in support.<sup>224</sup>

Yet, *Riley* and *Becerra* can be reconciled with respect to the constitutionality of government-required disclosures of professional status. When the *Riley* Court suggested that such a requirement would pass muster, the Court was not considering a requirement that included government-mandated language; instead, the requirement was merely that the language be unambiguous.<sup>225</sup> In contrast, the *Becerra* Court was considering “a government-drafted statement”<sup>226</sup> that might “drown[] out the facility’s own message.”<sup>227</sup> The California requirement would have been more likely to pass muster if the State had permitted the clinics to craft their own unambiguous messages. That said, however, California could permissibly drown out a message that was misleading or likely harmful to women’s health,<sup>228</sup> although the *Becerra* Court did not seem to believe that at issue.<sup>229</sup>

Notably absent in the *Becerra* majority or concurring opinion was any mention of the deceptive practices of some clinics, although the dissent explicitly notes that the

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223. *Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 246 (2d Cir. 2014) (citation omitted).

224. *See id.* at 246–47.

225. *Riley*, 487 U.S. at 799 n.11.

226. *Becerra*, 138 S. Ct. at 2378.

227. *Id.*

228. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”).

229. *See infra* notes 230–31 and accompanying text.

*Zauderer* Court “ask[ed] whether the disclosure requirements were “reasonably related to the State’s interest in preventing deception of consumers.”<sup>230</sup> The majority’s failure to mention the deception was significant if only because such an omission might lead those reading the opinion to misunderstand what various states have been trying to do with regard to the clinics, namely, clear up some misconceptions that might have arisen because of misleading advertising or because of confusing signage or because of the confusing way that some employees might be dressed.<sup>231</sup>

Suppose that California had only been interested in clearing up some of the misconceptions that might arise from confusing advertising. In that event, the State might have required that misleading advertising include clarifying language so that women considering going to the clinic would know which services would actually be provided by the clinic. Such an approach was upheld by the Ninth Circuit, an opinion that the Court refused to review.<sup>232</sup> However, such an approach would not have reached those women whose misunderstanding about which clinic services were provided was not due to false advertising, and California was likely trying to address *both* deceptive advertising and on-site practices that did not communicate to those seeking services which services would or could be provided.<sup>233</sup>

The *Becerra* Court suggested that the California requirement imposed on unlicensed clinics was “unjustified and unduly burdensome under *Zauderer*.”<sup>234</sup> Because that

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230. *Becerra*, 138 S. Ct. at 2387 (Breyer, J., dissenting) (quoting *Zauderer*, 471 U.S. at 651). *See also id.* at 2390.

231. *See supra* notes 19–21 and accompanying text.

232. *See First Resort, Inc. v. Herrera*, 860 F.3d 1263 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 2709 (2018).

233. *See supra* note 169 and accompanying text (noting that the requirement applied to advertising and to what must be included on-site).

234. *Becerra*, 138 S. Ct. at 2378.

requirement was imposed “no matter what the facilities say on site or in their advertisements,”<sup>235</sup> the requirement could not stand. Regrettably, the Court made matters more rather than less murky when suggesting that California had “impose[d] an unduly burdensome disclosure requirement that will chill . . . protected speech,”<sup>236</sup> because the example offered by the Court was of “a billboard for an unlicensed facility that says ‘Choose Life.’”<sup>237</sup> If indeed the statue would have required that such a billboard disclose the requisite information,<sup>238</sup> then the California law failed to distinguish between advertising of a service and expression of a political view about abortion. But if that was the reason that the statute failed to pass muster, then one would expect that the difficulty could have been resolved by including clarifying language that the statute was not meant to reach political speech.<sup>239</sup>

*Zauderer* also involved a claim that the advertising regulation was reaching political speech, but the Court rejected that challenge by noting that what might be political in another context was nonetheless still commercial in the context before the Court. “Appellant’s advertising contains statements regarding the legal rights of persons injured by the Dalkon Shield that, in another context, would be fully protected speech. That this is so does not alter the status of the advertisements as

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235. *Id.* at 2377.

236. *Id.* at 2378.

237. *Id.*

238. *See id.* (“As California conceded at oral argument, a billboard for an unlicensed facility that says ‘Choose Life’ would have to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages.”).

239. *Cf. First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017) (“[T]he City did not attempt to ban advertisements related to constitutionally protected pro-life advocacy; . . . [t]he City respects the rights of [LSPCs] to counsel against abortions . . . and the City does not intend . . . to regulate, limit or curtail such advocacy.” (citation omitted)).

commercial speech.”<sup>240</sup> The *Zauderer* Court noted that “Ohio has placed no general restrictions on appellant’s right to publish facts or express opinions regarding Dalkon Shield litigation; Ohio’s Disciplinary Rules prevent him only from conveying those facts and opinions in the form of advertisements of his services as an attorney.”<sup>241</sup> So, too, one might have expected the *Becerra* Court to explain that California was placing no restriction on the right to express opinions on the merits of childbirth over abortion as long as this was not in the form of advertisements of clinic services.

The *Becerra* Court cautioned that it was “express[ing] no view on the legality of a similar disclosure requirement that is . . . less burdensome.”<sup>242</sup> For example, state regulations of clinics that engaged in deceptive advertising would be more limited, especially if the State required that the deceptive advertising be corrected without at the same time mandating that government-prescribed language be used.<sup>243</sup> So, too, regulation of on-site deceptive practices might be upheld, especially given a showing of consumer confusion. Thus, *Becerra* may be viewed as a limited ruling in that a less robust statute might be upheld if it did not require government-mandated language or, perhaps, did not target those clinics who were quite forthright about which services were or were not provided. However, *Becerra* might also be read more broadly and might have implications in other contexts.

#### IV. APPLICATIONS IN OTHER CASES

The *Becerra* Court seemed outraged that the State

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240. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 n.7 (1985).

241. *Id.* at 637 n.7.

242. *Becerra*, 138 S. Ct. at 2378.

243. *See First Resort*, 860 F.3d at 1273. *See also* *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (“The State may deal effectively with false, deceptive, or misleading sales techniques.” (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976))).

would require that CPCs communicate the government's favored message to those seeking clinic services. Yet, states require that pregnant women receive various kinds of information when deciding whether to carry their pregnancies to term. Further, the State may require posting a variety of notices that employers do not wish to post, and *Becerra* provides a basis for challenging the constitutionality of several of these state requirements.

#### A. *Abortion*

The *Becerra* Court implied that California opposed the clinics' anti-abortion views.<sup>244</sup> But the *Becerra* limitations on government-prescribed speech and on requiring dissemination of controversial matters might have implications for other abortion regulations.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality noted that "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."<sup>245</sup> However, the plurality cautioned that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."<sup>246</sup>

The *Casey* analysis focused on whether requiring a pregnant woman to hear certain information violated her right to privacy protected by the Fourteenth Amendment,<sup>247</sup> noting that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all

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244. See *supra* notes 152–155 and accompanying text.

245. 505 U.S. 833, 878 (1992).

246. *Id.*

247. See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 278 (1993) ("[T]he right to abortion has been described in our opinions as one element of a more general right of privacy, . . . or of Fourteenth Amendment liberty." (citations omitted)).

others in doing so.”<sup>248</sup> As far as her 14<sup>th</sup> Amendment rights were concerned, “a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”<sup>249</sup> That information was to include “the ‘probable gestational age of the unborn child.’”<sup>250</sup> In addition, the “physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion.”<sup>251</sup> Unless the woman was willing to certify in writing that she had “been informed of the availability of these printed materials and ha[d] been provided them if she cho[se] to view them,”<sup>252</sup> the abortion could not be performed.<sup>253</sup>

The *Casey* plurality discussed the “substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth.”<sup>254</sup> Refusing to construe informed consent narrowly,<sup>255</sup> the plurality saw “no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”<sup>256</sup> Abortion was not being treated differently from other medical procedures—“a

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248. *Casey*, 505 U.S. at 877.

249. *Id.* at 878.

250. *Id.* at 881 (citation omitted).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 882.

255. *Id.* at 883 (“[I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant.”).

256. *Id.* at 882.

requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”<sup>257</sup>

Yet, analogizing abortion to other kinds of medical procedures may have important implications. Suppose, for example, that a pregnant woman is at risk of having severe complications if she carries her pregnancy to term.<sup>258</sup> A doctor who failed to apprise her of her condition and of the alternatives open to her might well be subject to liability.<sup>259</sup> Nor would a physician be immune from liability merely because he himself does not provide the service at issue.<sup>260</sup> But a broadly construed informed consent requirement *might* have important implications for CPCs.

The *Becerra* Court seemed incensed that a clinic could be required to post something about abortion because the imposition of such a requirement would alter what the clinic would say and would support a position opposed by the clinic. Yet, the *Becerra* Court seemed unaware that the

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257. *Id.* at 884.

258. Even were the pregnancy not high-risk, there might be a question whether a woman should be informed about the morbidity/mortality rates of early abortion versus carrying a child to term. *Cf.* *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 968 (W.D. Wis.) (“[T]he risk of death associated with childbirth in the United States is approximately 14 times higher than that associated with abortion, and women are more likely to experience complications from live births than from having abortions.”), *aff’d sub nom.* *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015).

259. *Cf.* *King v. Jordan*, 696 N.Y.S.2d 280, 281 (App. Div. 1999) (“To establish her lack of informed consent cause of action, plaintiff was required to adduce evidence showing that (1) defendant failed to disclose alternatives “which would have been disclosed by a reasonable medical practitioner, (2) a reasonably prudent person in plaintiff’s position would not have undergone the treatment had the person been fully informed, and (3) the lack of informed consent was a proximate cause of her injury.” (citation omitted)).

260. *See Roberson v. Counselman*, 686 P.2d 149, 152 (Kan. 1984) (“Like physicians, a chiropractor may be liable for failing to refer a patient to a medical practitioner.”), *modified*, *Delaney v. Cade*, 873 P.2d 175 (Kan. 1994).

*Casey* plurality had given short shrift to “an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. While acknowledging that physicians had a right not to speak,<sup>261</sup> the plurality reasoned that the right not to speak was implicated “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”<sup>262</sup> Given that standard, the plurality saw “no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”<sup>263</sup>

It is unclear what to say about *Casey*’s guidance in the *Becerra* context. Some of the clinics at issue were unlicensed, which suggests that they were not engaging in the practice of medicine and so might not be thought subject to limitations on the practice of medicine. Yet, *Casey* suggests that the “physician or qualified nonphysician must inform the woman”<sup>264</sup> on a variety of matters, which means that even those not practicing medicine were subject to the applicable requirements. Further, some of the women going to CPCs may have been led to believe that the clinics provided medical care,<sup>265</sup> which put those women at risk if they were not receiving such care. Not only might such women be wasting their precious time,<sup>266</sup> but they might be induced not to seek *needed* medical care elsewhere,

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261. *Casey*, 505 U.S. at 884 (“To be sure, the physician’s First Amendment rights not to speak are implicated.”).

262. *Id.*

263. *Id.*

264. *Id.* at 881.

265. *Cf.* *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1275 (9th Cir. 2017) (“[T]he Ordinance is directed at advertisements related to the provision of certain medical services.”).

266. *See id.* at 1269 (noting that “[w]hen a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy,” and “may also lose the option to choose a particular procedure, or to terminate a pregnancy at all” (citations omitted)).



precisely because they mistakenly believed that they had already received such care.<sup>267</sup>

After *Becerra*, the *Casey* deference to state regulations on abortion may no longer represent the law. For example, the *Becerra* Court implied that the State could only require dissemination of factual noncontroversial information.<sup>268</sup> But much information regarding abortion is controversial. Indeed, when describing “abortion [as] anything but an ‘uncontroversial’ topic,”<sup>269</sup> the Court seemed to imply that the State was exceeding its power by requiring the dissemination of any particular information on this inherently contested topic.

Consider a state law requiring physicians to inform patients seeking abortions that an “abortion will terminate the life of a whole, separate, unique, living human being.”<sup>270</sup> Such a statement is hardly uncontroversial,<sup>271</sup> and state-required dissemination of information making abortion *less* attractive may not be able to pass muster after *Becerra*.<sup>272</sup>

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267. Nat'l Inst. of Family & Life Advocates v. Harris, 839 F.3d 823, 839–40 (9th Cir. 2016) (“There is no question that Pregnancy Care’s clients go to the clinic precisely because of the professional services it offers, and that they reasonably rely upon the clinic for its knowledge and skill. . . . [L]icensed clinics offer medical and clinical services in a professional context.”), *rev’d sub nom.* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). Cf. Sylvia A. Law, *Silent No More: Physicians’ Legal and Ethical Obligations to Patients Seeking Abortions*, 21 N.Y.U. REV. L. & SOC. CHANGE 279, 313 n.181 (1995) (“[T]he Reagan administration promulgated regulations prohibiting these clinics’ personnel from discussing abortion or from providing referrals for abortion, even if the woman requested such information and the physician knew that pregnancy posed a serious medical risk to the woman.”).

268. See *supra* note 202 and accompanying text.

269. *Becerra*, 138 S. Ct. at 2372.

270. *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008).

271. See *id.* at 728 (“Dr. Wolpe’s affidavit included a curriculum vitae detailing his expertise in ‘the area of ideology in medicine and bioethics.’ Dr. Wolpe stated that the proposition ‘that from the moment of conception, an embryo or fetus is a “whole, separate, unique, living human being” . . . is not a scientific or medical fact, nor is there a scientific or medical consensus to that effect.’”).

272. See, e.g., *Stuart v. Loomis*, 992 F. Supp. 2d 585, 588 (M.D.N.C.) (“The

*Becerra* may have important implications for abortion jurisprudence generally because state-required dissemination of both pro-choice and pro-life abortion positions seems much less likely to survive constitutional scrutiny.

### B. *First Amendment*

The *Becerra* Court may be modifying First Amendment jurisprudence in a few areas, although that will depend upon whether the implied positions are later ignored or, instead, developed. It is simply unclear whether the Court is signaling a new era in the regulation of commercial and professional speech. It is also unclear whether the State will now be precluded from requiring the posting of mandated speech on a variety of topics.

#### 1. Commercial and professional speech

The *Becerra* Court denied both that “‘professional speech’ [i]s a separate category of speech”<sup>273</sup> and that speech is “unprotected merely because it is uttered by ‘professionals.’”<sup>274</sup> But the Court left open the conditions under which regulations of professional speech will trigger less demanding scrutiny.

Consider the examples provided by the Court where state regulations would be given greater deference, for example, the Court has “applied a lower level of scrutiny to laws that compel disclosures in certain contexts,”<sup>275</sup> such as

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Supreme Court has never held that a state has the power to compel a health care provider to speak, in his or her own voice, the State’s ideological message in favor of carrying a pregnancy to term, and this Court declines to do so today. To the extent the Act is an effort by the State to require health care providers to deliver information in support of the State’s philosophic and social position discouraging abortion and encouraging childbirth, it is content-based, and it is not sufficiently narrowly tailored to survive strict scrutiny.”), *aff’d sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

273. *Becerra*, 138 S. Ct. at 2371.

274. *Id.* at 2371–72.

275. *Id.* at 2372.

a “disclosure requirement govern[ing] only ‘commercial advertising’ and requir[ing] the disclosure of ‘purely factual and uncontroversial information about the terms under which . . . services will be available.’”<sup>276</sup> This exception is relatively narrow, especially if “uncontroversial information” is defined narrowly.<sup>277</sup> For example, the Court noted that abortion is “anything but an ‘uncontroversial’ topic.”<sup>278</sup> But if that helped explain why California’s regulation did not pass constitutional muster, then state regulations requiring the posting of information on a whole host of controversial matters involving health, wealth, happiness, and daily living might be unconstitutional. Indeed, if only “purely factual” information can readily be regulated and there is much debate about which assertions involve “false facts,”<sup>279</sup> there may be even further narrowing of the category of statements whose regulation is subject to more deferential review.

The Court mentioned an additional exception, namely, “regulations of professional conduct that incidentally burden speech,”<sup>280</sup> for example, “[l]ongstanding torts for professional malpractice.”<sup>281</sup> But this exception might also be relatively narrow. For example, the *Becerra* Court nowhere considers whether the unlicensed clinics would be liable in tort for their failure to tell a patient that she was at risk of severe health complications if she did not get an abortion, and the Court might well reject that such liability could be imposed because the information supplied by a

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276. *Id.* (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

277. *See supra* note 200 and accompanying text.

278. *See Becerra*, 138 S. Ct. at 2373 (“[I]t requires these clinics to disclose information about . . . abortion . . .”).

279. *Cf. United States v. Alvarez*, 567 U.S. 709, 722 (2012) (discussing “statements nominally purporting to contain false facts”).

280. *Becerra*, 138 S. Ct. at 2373.

281. *Id.*

clinic “is not tied to a procedure at all.”<sup>282</sup>

The Court’s presumed view might seem attractive at first. Someone who went to a clinic knowing that the clinic did not provide medical services would neither expect to be provided such services nor have much cause for complaint when such services were not provided. But some of the women attending these clinics were likely induced to have the mistaken belief that they were getting medical advice, and the State was trying to avoid some of the difficulties that would arise from a woman’s thinking that she had gotten medical advice when she had not. If the State can neither require posting corrective information nor impose liability for the foreseeable harms that might result from some of these misunderstandings, then the State is being handcuffed in its attempts to promote public health and safety.

The Court suggested that outside of the two exceptions it discussed—(1) compelling disclosure in the commercial context of purely factual and uncontroversial information and (2) incidental burdens on speech in the malpractice context—the Court has “long protected the First Amendment rights of professionals.”<sup>283</sup> But this suggests that unless these possibly narrow exceptions have been met, state regulations of professionals may have to pass muster under strict scrutiny to be upheld.

*Becerra* implies that the Court may be unwilling to distinguish between commercial and political contexts. The Court suggested that the clinics had a particular (anti-abortion) viewpoint that they were trying to promote and that requiring that the clinics to post that the State provides low- or no-cost abortions would undermine the clinics’ desired message.<sup>284</sup> But the posting requirement was not being imposed in a political setting, but in a setting

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282. *Id.*

283. *Id.* at 2374.

284. *Id.* at 2371.

where services were provided and where there was reason to fear that some of the clients were misinformed about the actual services provided.<sup>285</sup> To analyze the constitutionality of the requirement in terms of whether it could be imposed in a political setting is to radically misconstrue the purpose behind the posting requirement and may make imperil state attempts to require postings on other matters.<sup>286</sup>

## 2. Posting requirements

The State requires employers to post certain information to assure that employees are informed, for example, about safety requirements<sup>287</sup> or minimum wage or overtime requirements.<sup>288</sup> But such postings might be considered controversial in that the employer believes the requirements unnecessary and burdensome and in any event certainly alters the message that the employer would otherwise deliver. Further, to the extent that *Becerra* is protecting the right of clinics not to articulate factual

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285. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 843 (9th Cir. 2016) (“[G]iven the Legislature’s findings regarding the existence of CPCs, which often present misleading information to women about reproductive medical services, California’s interest in presenting accurate information about the licensing status of individual clinics is particularly compelling.”), *rev’d sub nom.* *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018); *see id.* at 829 (“The Legislature found that CPCs, which include unlicensed and licensed clinics, employ ‘intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care.’” (citation omitted)).

286. *Cf. Evergreen Ass’n v. City of N.Y.*, 740 F.3d 233, 249 (2d Cir. 2014) (“Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives.”).

287. *Lake Butler Apparel Co. v. Sec’y of Labor*, 519 F.2d 84, 85 (5th Cir. 1975) (discussing a statutory requirement “to post the standard OSHA [Occupational and Safety Health Administration] poster informing the employees of their safety rights under the Act”).

288. *Darowski v. Wojewoda*, No. 3:15-CV-803, 2017 WL 6497973, at \*6 (D. Conn. Dec. 19, 2017) (discussing employer “obligations under . . . the FLSA [Fair Labor Standards Act] . . . to post notices in the workplace explaining Plaintiff’s rights to minimum wage and overtime compensation”).

statements that they would prefer to avoid, a number of entities would seem protected from being forced to articulate disapproved messages.

Arguably, requiring such postings do not offend First Amendment guarantees because the signs involve government speech rather than employers being forced to articulate views that they neither hold nor wish to communicate.<sup>289</sup> But the *Becerra* Court did not uphold the California requirement because, after all, it was the government speaking about the services that it provides. On the contrary, the Court struck down the requirement because the posting includes information about a service of which the clinics disapproved.

Part of the reason that the *Riley* Court struck down regulations about what professional fundraisers had to say was the State had other means to communicate the desired message.<sup>290</sup> But the same argument could be made in a variety of contexts—the *Becerra* Court may be suggesting that there can be no requirement that government speech be posted in a private setting because the government has alternative ways to inform the public of the relevant information, for example, by undertaking massive and expensive public education campaigns, that do not impose the same First Amendment burdens. Such an approach would have important implications for the constitutionality of a variety of posting requirements.

#### IV. CONCLUSION

The *Becerra* Court struck down a California requirement that CPCs post certain information on-site and

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289. *Nat'l Ass'n of Mfrs. v. NLRB*, 846 F. Supp. 2d 34, 58 (D.D.C. 2012) (“But the Board’s notice posting requirement does not compel employers to say anything. The poster that the regulation prescribes for the workplace is ‘government speech,’ which is ‘not subject to scrutiny under the Free Speech Clause.’”), *aff’d in part, rev’d in part*, 717 F.3d 947 (D.C. Cir. 2013).

290. *See supra* notes 109–120 and accompanying text.

in their advertising. It may be that the requirement was overbroad because forcing clinics to use government-mandated language even if those clinics provided the relevant information in their own words and even if the clientele was already aware of what services were and were not provided by the clinics. If the correction of those shortcomings would suffice to save the California statute from invalidation, then the *Becerra* opinion may not be particularly momentous.

Yet, *Becerra* may not be cabined so readily. It offers analyses of the conditions under which state regulations of commercial and professional speech will be upheld which may severely constrain state regulation of such speech and, in addition, may make it more difficult to distinguish between commercial and noncommercial speech. *Becerra* may provide constitutional protection for a variety of commercial entities who refuse to provide factual information that those entities would simply prefer to avoid.

*Becerra* may well provide the basis for challenging a number of state-imposed requirements regarding the dissemination of information about a number of matters including health and safety information, worker rights, and controversial views about fetal status and development. While it is unclear what *Becerra* will be taken to mean in the future, it is clear that the Court has, “unwittingly or otherwise,”<sup>291</sup> provided the basis for modifying both abortion jurisprudence and several areas of First Amendment law.

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291. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).